

Date: December 14, 2021

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (Revised December 2021)(VIEWS 06427070)

To: Heads of the Contracting Activities

1. Purpose. To issue a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404, to implement Executive Order (E.O.) 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). Federal agencies were authorized by the Civilian Agency Acquisition Council letter [2021-03](#), dated September 30, 2021 to issue a class deviation. The Office of Management and Budget has recently issued revised guidance on the implementation of E.O. 14042, due to requirements of preliminary injunctions issued by the United States Federal Court of the Eastern District of Kentucky on November 30, 2021 (Kentucky, Ohio, and Tennessee injunction), and the United States District court for the Southern District of Georgia on December 7, 2021 (nationwide injunction), both enjoining the implementation of E.O. 14042's provisions. The class deviation is revised to provide updated procedures for contracts and contract-like instruments performed in a U.S. State or outlying area of the United States. This class deviation revises and supersedes Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated October 1, 2021.

2. Effective Date. Immediately.

3. Expiration Date. This deviation expires when incorporated into the FAR or is otherwise rescinded.

4. Applicability. This class deviation applies to solicitations and contracts for services, including construction.

5. Current FAR Policy. There is no current FAR policy.

6. Need for Deviation. E.O. 14042 was signed by the President on September 9, 2021 and published in the Federal Register at [86 FR 50985](#) on September

14, 2021. The E.O. requires agencies to include a clause in applicable contracts requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the [Safer Federal Workforce Task Force \(Task Force Guidance\)](#). The clause applies to solicitations and contracts for services, including construction.

7. Need for Revision: On December 1, 2021, OMB issued initial guidance on implementing requirements of Executive Order 14042 while ensuring compliance with a court order covering the States of Kentucky, Ohio, and Tennessee. That guidance is hereby rescinded. Since the issuance of that initial guidance, another court has issued a nationwide injunction—an order that bars enforcement of the Executive Order in any state or outlying area of the United States. Both court orders are preliminary and may be supplemented, modified, or vacated, depending on the course of ongoing litigation. Given the uncertainty surrounding the court orders, OMB has formulated the updated guidance below to be applicable even if the existing court orders change or new orders are issued.

8. Required Action. Contracting officers must follow the instructions provided in this updated guidance to ensure compliance with currently applicable court orders.

I. For existing contracts or contract-like instruments (hereinafter “contracts”) that contain a clause implementing requirements of Executive Order 14042

Agencies shall notify the contractor of the following:

The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the contracting officer, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”). In all other circumstances, the Government will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

Agencies may provide that notification, as well as any other contractor notification required by this guidance, by posting the necessary

information in a centralized location monitored by contractors, such as sam.gov.

II. For existing contracts that do not include a clause implementing requirements of Executive Order 14042

A. If the work under such a contract is performed entirely in an Excluded State or Outlying Area, the contracting officer must not attempt to add a clause implementing requirements of the Executive Order into the contract.

B. For all other contracts to which the Executive Order applies, when exercising an option, issuing a new order under the contract, or extending the term of the contract, the contracting officer must pursue bilateral modification of the contract to include the clause. If the contracting officer is not exercising an option, issuing a new order, or extending the contract's term, the contracting officer *may* pursue bilateral modification to include the clause. In either case, when requesting that a contractor agree to the addition of the clause, the contracting officer must inform the contractor of the following:

The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the contracting officer, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, "Excluded State or Outlying Area"). In all other circumstances, the Government will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

III. For solicitations (existing or future), including solicitations for new orders to be issued under existing indefinite delivery/indefinite quantity contracts not containing a clause that implements requirements of Executive Order 14042

A. If the solicitation indicates that work under the contract to be awarded will be performed entirely in an Excluded State or Outlying Area, the solicitation should not include a clause implementing requirements of Executive Order 14042. If the solicitation does include such a clause, the

contracting officer must remove it through an amendment to the solicitation.

B. For all other solicitations to which Executive Order 14042 applies, the contracting officer must include a clause implementing requirements of the Executive Order and a provision stating as follows:

The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the contracting officer, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, "Excluded State or Outlying Area"). In all other circumstances, the Government will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

If an existing solicitation to which Executive Order 14042 applies does not contain both the implementing clause and the provision described above, the contracting officer must amend the solicitation to add those terms.

Note: The court orders only apply to the application of requirements pursuant to Executive Order 14042. There is no change to the Safer Federal Workforce Task Force's guidance for COVID-19 workplace safety protocols for Federal agencies. Federal agency workplace safety protocols for Federal buildings and Federally controlled facilities still apply in all locations. Contractor employees working onsite in those facilities must still follow those Federal agency workplace safety protocols.

9. Additional information. Send questions to va.procurement.policy@va.gov.

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Angela Billups, Ph.D.

Attachment

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FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]
